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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PACIFIC BALLERS CLUB, et al., Plaintiffs and Respondents, v. CSKG AMERICA, et al., Defendants and Appellants.	B157613 (Los Angeles County Super. Ct. No. YC 038395)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cary H. Nishimoto, Judge. Affirmed in part and reversed in part.

Kirk G. Downing for Defendants and Appellants.

No appearance for Plaintiffs and Respondents.

This case arose out of a commercial lease transaction. Defendants CSKG America, LLC ("CSKG"), the lessor and owner of the subject property in Hawthorne, Stanley Cheung, its principal, and Grace Cheung, Stanley's wife, appeal from a $1,009,010 judgment in favor of plaintiffs Pacific Ballers Club, LLC ("Pacific Ballers") and King Illustrated Ink, Inc. ("King"), the lessees of the subject property. Plaintiffs leased the property in order to operate a large scale restaurant and club on the site. Defendants raise several alleged errors. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL SYNOPSIS

The subject commercial property included property formerly known as the Cockatoo Inn. CSKG acquired the property at a foreclosure sale.

Stanley Cheung is the principal owner of CSKG. Sonny Kirksey and Matthew Wolfson were the owners of Pacific Ballers and King respectively.[1] Stanley's limited communications with the lessees were conducted through an interpreter, Tony Gong, an employee of CSKG and Grace's brother. Kirksey and Wolfson were relatively experienced and sophisticated businessmen. Kirksey claimed to have been a successful restauranteur and businessman. Wolfson was a lawyer who had previously been involved in litigation concerning the subject property. Kirksey and Wolfson visited the premises on numerous occasions, and negotiations about the lease consumed several months.

Kirksey and Wolfson sought out Cheung and proposed to lease the subject property. Cheung was not actively seeking to rent the property.

The Cockatoo Inn restaurant was not operating at the time the lease was signed. The lease included three months free rent for start-up but contained no requirement that CSKG borrow millions to build essentially a new restaurant for plaintiffs. During cross-examination, Kirksey acknowledged he knew there was no financing in place for improving the premises when he signed the lease.

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[1] Wolfson sold his interest in King to Kirksey a month before trial.

At trial, Kirksey and Wolfson testified they were fraudulently induced to enter into the lease based on representations by defendants that they had a Howard Johnson franchise and $25 million in financing and there was going to be a five-star Howard Johnson hotel at the site. Kirksey and Wolfson testified they saw a business plan which included over $4 million to renovate the exterior of the restaurant they were going to run.

Following a jury trial, a special verdict of $902,050 was entered against defendants. The judgment consisted of $222,050 in compensatory damages and $680,000 in punitive damages ($200,000 against CSKG, $240,000 against Stanley, and $240,000 against Grace). The case was not bifurcated.

In their memorandum of costs, plaintiffs sought attorney's fees. The court awarded $100,892.50 as attorney's fees. Total costs awarded were $106,960, for a total judgment of $1,009,010, plus interest.[2]

Defendants filed a timely notice of appeal.

DISCUSSION

I. Introduction

Plaintiffs did not file a respondents' brief in this case; thus, this court will decide the appeal on the record, the opening brief and any oral argument by defendants. (Cal. Rules of Court, rule 17(a)(2) & (c).) "Some courts have treated the failure to file a respondent's brief as a consent to reversal. But that scenario is rare: [¶] The prevailing approach is to examine the record on the basis of appellant's brief and reverse only if prejudicial error is found." (Citation omitted.) (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) § 9:282.)

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[2] Although defendants claim the court denied their motion for new trial, the record on appeal contains no such motion or ruling.

The latter approach is particularly appropriate in this case as, for the most part, defendants have simply repeated arguments they made in motions in limine without addressing the basis on which the trial court denied those motions and presented some issues with only conclusionary arguments or without any citations to authority or the record. (See *MST Farms v. C. G. 1464* (1988) 204 Cal.App.3d 304, 306 ["This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record."].) Moreover, defendants provide the briefest of fact statements composed mainly of evidence favorable to themselves.

Questions of law, such as the type of evidence needed to impose punitive damages, as well as questions of the meaning of writings, such as a lease, and questions of statutory interpretation are reviewed de novo. (*Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal.App.4th 1, 5.) Findings of fact are reviewed under the substantial evidence test under which we view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Bickel v. City of Peidmont* (1997) 16 Cal.4th 1040, 1053.)

II. Punitive Damages

Defendants contend the punitive damage award must be vacated due to the lack of evidence of each defendant's financial circumstances. We agree. In *Adams v. Murakami* (1991) 54 Cal.3d 105, 108-109, the court held that evidence of a defendant's financial condition was a prerequisite to an award of punitive damages and that the burden was on the plaintiff to introduce such evidence. (See also *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1410 [If there is no evidence of a defendant's financial condition in the record, "the award of punitive damages is excessive as a matter of law and must be reversed."].) In the case at bar, plaintiffs adduced no evidence of the net worth, liabilities or financial condition of any of the defendants.

During discussions about instructions, defense counsel noted there was no evidence of defendants' financial condition. Plaintiffs' counsel responded there was some evidence of the financial condition in that: "They owned the property that's in dispute. That's worth several million dollars, at least." There is no record of the value of that property in the record before this court. Moreover, ownership of a piece of property without more does not establish each defendant's financial condition. Consequently, we reverse that part of the judgment awarding punitive damages.

III. Lease Terms

Defendants contend that the court erred by allowing parol evidence thus rewriting the lease in violation of Civil Code section 1625 (contract in writing supercedes all negotiations) and Code of Civil Procedure section 1856, subdivision (a) (terms in writing may not be contradicted by evidence of prior or contemporaneous oral agreement) and that evidence of collateral oral agreements that directly contradict the written lease is inadmissible. (*American Nat. Ins. Co. v. Continental Parking Corp*. (1974) 42 Cal.App.3d 260, 265-266.)

Defendants sought to bar parol evidence of fraudulent inducement in a motion in limine. The operative pleading alleged:

> "Before and contemporaneously with negotiating a lease for the Leased Premises with Plaintiffs, Defendants represented to Plaintiffs, that, among other things, they were a franchisee of the Howard Johnson's hotel chain, that there would be a Howard Johnson's hotel on the property, that they had a business plan and the funds available to, and would refurbish the hotel adjacent to the Leased Premises, that there would be no obstacles to Plaintiffs building and operating a restaurant on the Leased Premises, and that there were certain repairs they, the Defendants, would make and would be making, pursuant to the business plan, to the property and, specifically, to the Leased Premises, before Plaintiffs would have

> any obligations under the lease. Defendants further represented that Plaintiffs would have no obligations under the lease, including the payment of the security deposit, until Defendants actually gave possession of the Leased Premises to Plaintiffs."

As support for defendants' claim that the fraudulent representations supposedly made by them were precluded by the lease, defendants cited the following provisions in the lease:

> "2.4 Acknowledgments. Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the condition of the Premises . . . , and their suitability for Lessee's intended use, (b) Lessee has made such investigation as it deems necessary with reference to such matters and assumes all responsibility therefore as the same relate[s] to its occupancy of the Premises . . . ."

> "22. No Prior or Other Agreements; Broker Disclaimer. This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding shall be effective. Lessor and Lessee each represents and warrants to the Brokers that it has made, and is relying solely upon, its own investigation as to the nature, quality, character and financial responsibility of the other Party to this Lease and as to the use, nature, quality and character of the Premises. . . ."

Defendants also note that portions of the lease requiring "compliance with building codes" and "conditions" were crossed out by the parties.

The court denied the motion citing *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1138, in which the court reasoned: "It is well established that a party to an agreement induced by fraudulent misrepresentations or nondisclosures is entitled to rescind, notwithstanding the existence of purported exculpatory provisions contained in the agreement. The rule of nonimmunity has been stated by a leading

commentator [Witkin] in the following language: 'A party to a contract who has been guilty of fraud in its inducement cannot absolve himself from the effects of his fraud by any stipulation in the contract, either that no representations have been made, or that any right which might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision.'" (Citation omitted.) (See also *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp*. (1995) 32 Cal.App.4th 985, 996.)

Accordingly, despite the lease language, evidence of the fraudulent representations used to induce plaintiffs to enter the lease was admissible.

IV. Attorney's Fees

Defendants contend it was an error to add just over $100,000 in attorney's fees as plaintiffs' action was based on fraud not contract. Defendants suggest that by opposing defendants' request to enforce the waiver of jury trial provision in the lease, plaintiffs waived their right to relief under the lease. In opposing the request for attorney's fees in the trial court, defendants stated: "The sole issue before the Court would appear to [be] the reasonableness of the attorney fees sought by Plaintiff." Defendants did not oppose the fees on the ground the action was based on fraud not contract nor argue that plaintiffs had waived their right to attorney's fees.

Thus, defendants waived those grounds as a basis for reversing the award on appeal. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 390, pp. 440-441 & § 394, pp. 444-446.) Moreover, defendants cross-complained against plaintiffs alleging a breach of contract (the lease) to pay rent. At trial, defendants urged the jury to award them $380,000 in back rent. The jury found for plaintiffs on that claim.

V. Finding against the Cheungs

Defendants contend that because the only alleged false statements were made by Tony Gong, there was insufficient evidence to support a finding of fraud by either Stanley or Grace as they were not vicariously liable for Gong's misrepresentations. Defendants concede CSKG was vicariously liable for Gong's statements. The record shows that many of the misrepresentation made by Gong were as an interpreter for Stanley; but, it does not appear that Grace made any of the misrepresentations that induced plaintiffs to enter into the lease.

Consequently, we will reverse the judgment in so far as it is against Grace.

VI. Jury Trial

Defendants argue this matter was improperly set for jury trial over their objection that the parties had waived the right to jury trial in the lease. The court overruled defendant's objection on the basis that where an agreement is procured by fraud, none of its provisions are binding. Defendants urge this situation is analogous to enforcing an arbitration clause even when fraud had been alleged citing to *Erickson, Arbuthnot, McCathy, Kearney & Walsh, Inc. v. 100 Oak Street* (1989) 207 Cal.App.3d 63. The case at that cite is *Green v. Mt. Diablo Hospital Dist*., a case which refers to Ericksen, which appears at 35 Cal.3d 312.

We are not convinced that the policy behind enforcing an arbitration clause is analogous to enforcing a waiver of the right to jury trial. Moreover, *Green* notes that fraud which permeates the entire contract vitiates arbitration and requires judicial determination. (*Green v. Mt. Diablo Hospital Dist*. (1989) 207 Cal.App.3d 63, 70.) The court did not err in overruling defendants' objection to a jury trial. (See *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp*., *supra*, 32 Cal.App.4th 985, 996.)

VII. Standing

Defendants contend that neither plaintiff had standing to sue. Defendants argue that because King was a Nevada corporation, it had to qualify with the Secretary of State to do business in California. (Corp. Code, § 2203; *United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1739-1741 ["A foreign corporation transacting intrastate business which has failed to qualify may not, however, maintain an action commenced prior to qualification, except upon the satisfaction of certain conditions." (Emphasis deleted.)].) According to defendants, Pacific Ballers was not an aggrieved or injured party as it was not formed until after the suit was filed.

The provisions of Corporations Code sections 2203, subdivision (c) and 2105 require a foreign corporation to obtain a certificate of qualification to do business in the state in order to sue in the state on claims arising from intrastate business. (See *Neogard Corp. v. Malott & Petterson-Grundy* (1980) 106 Cal.App.3d 213, 220.)

Defendants describe King as a Nevada corporation which conducts its only business in California and was formed to do business in the illustration industry in California, and was a party to the subject lease. Defendants provide no record citation supporting their description of King. Defendants raised the issue of King's standing in a motion in limine. At the hearing, plaintiffs acknowledged that there was no dispute King was a Nevada corporation or that it was not registered to conduct intrastate business in California either at the time the complaint was filed or at the time of the hearing. Plaintiffs did not concede King was formed to do business in California and noted the only business King did was to sign the lease; it entered into no further contracts regarding the leased premises; any other contracts were entered into by Pacific Ballers, which was going to run the business. Defendants concede that other than signing the lease, King conducted no other business.

In opposition to defendants' motion in limine, plaintiffs noted that a single transaction did not constitute the carrying on or transacting of intrastate business within

the meaning of the registration statute. (See Corp. Code, § 191, subd. (a) ["'[T]ransacting intrastate business' means entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce."]; *Conference Free Baptists v. Berkey* (1909) 156 Cal. 466, 469-470.)

The burden of proving a corporation is precluded from maintaining an action is upon the party pleading the bar of the statute. (Cf. *Thorner v. Selective Cam Transmission Co.* (1960) 180 Cal.App.2d 89, 90.) Noting there were no related transactions by King, the court denied the motion without prejudice apparently on the basis King did not conduct repeated and successive transactions in the state. Under the circumstances here, defendants did not meet their burden of proving King was required to register with the Secretary of State.

In opposition to defendants' motion in limine to bar evidence by Pacific Ballers because it had not been formed at the time of the lease, plaintiffs noted that Kirksey had told defendants the name of the new entity, the lease had been taken out in the name of Pacific Ballers with full knowledge by everyone that it was not yet formed, and after its formation, Pacific Ballers ratified the lease. When the court denied defendants' motion, it did so without prejudice on the basis it did not see any authority holding a corporation could not after the fact ratify a previous agreement entered into by the principals. Defendants have not cited any authority to the contrary nor argued they should not be estopped from raising this argument based on their knowledge at the time the lease was signed.

Thus, the court did not err in denying the motions to bar evidence by King and Pacific Ballers.

DISPOSITION

That part of the judgment awarding punitive damages is reversed. That part of the judgment against Grace Cheung is reversed. In all other respects, the judgment is affirmed. Defendants are awarded costs on appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

MUÑOZ (AURELIO), J.*

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*Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.